IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1780

GENTRY CROWELL, Secretary of State of the State of Tennessee; RAY BLANTON, Governor of the State of Tennessee and his successors in office; BROOKS McLEMORE, Attorney General of the State of Tennessee and his successors in office; DAVID COLLINS, Coordinator of Elections of the State of Tennessee; and JAMES E. HARPSTER, JACK C. SEATON, TOMMY POWELL, RICHARD HOLCOMB, and LYTLE LANDERS, Commissioners of the State Board of Elections,
Appellants,

vs.

RICHARD MADER, PATRICIA MAE NORTON, MARY RICHARDSON, and MARSENA DARLENE WALKER,
Appellees.

JURISDICTIONAL STATEMENT FOR APPELLANT

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Appellees.

JURISDICTIONAL STATEMENT FOR APPELLANT

OPINIONS BELOW

The opinion of the three judge court dated January 15, 1975 is unreported and is reproduced herein as appendix A.

JURISDICTION

The opinion and order issued by the three judge court from which the appellants are appealing was entered on January 15, 1979. The notice of appeal was filed on February 14, 1979 and is reproduced herein as appendix B.

The jurisdiction of this court to review the instant case is conferred by 28 U.S.C. Section 1253.

STATUTE INVOLVED

Tennessee Code Annotated § 3-102 (as in effect in 1978):

"State senatorial districts—Residence requirements.—Until the next enumeration of qualified voters and apportionment of senators, the state senatorial districts shall be composed as follows:

(1) Senate district 1. Carter and Johnson Counties and that portion of Washington County which is not established as a portion of senate district No. 3, as set out hereinafter.

(2) Senate district 2. Sullivan County.

(3) Senate district 3. Greene, Hancock, Hawkins, and Unicoi Counties, and that portion of Washington County lying within the Sulphur Springs division and the Telford division, according to the 1970 federal census.

(4) Senate district 4, Claiborne, Cocke, Grainger, Hamblen, Jefferson and Union Counties.

(5) Senate district 5. Anderson and Roane Counties, and the following voting precincts of Knox County lying outside of the city of Knoxville: Corryton, Dante, Fort Sumter, Gibbs, Brickey, Heiskell, Hills, Pedigo, Halls, and Powell.

References to the Knox County voting precincts mean such voting precincts as they were delineated on May 1, 1973.

(6) Senate district 6. The following voting precincts of Knox County lying outside of the city of Knoxville: Huffs, Sunnyview, Ramsey, Riverdale, Dora Kennedy, Ellistown, Maloneyville, Ritta, Skaggstown, Carter, Thorngrove, Kings, Mount Olive, Sevier Homes, Vestal, Gap Creek, and Hopewell, and the following voting wards of the city of Knoxville: 1, 6, 7, East 11, Middle 11, West 11, 12, 13, Middle 14, East 14, East 15, West 15, South 16, North 16, East 17, West 17, FH 19, SH 19, 20, FH 25, 25 Vestal, East 26, West 26, 27, 28, 29, 30, 31, 32, 33 and 34.

References to the Knox County voting precincts and the voting wards of the city of Knoxville mean such voting precincts and voting wards as they were delineated on May 1, 1973.

(7) Senate district 7. The following voting precincts of Knox County lying outside the city of Knoxville: Lonas, Hardin Valley, Karns, Solway, Concord, Farragut, Cedar Bluff, Bluegrass Ball Camp, Rocky Hill and Shannondale; and the following voting wards of the city of Knoxville: 9 North 10, South 10, 18, 21, South 23, North 23, South 24, North 24, Seq. 24, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, North 50, South 50 and 51.

References to the Knox County voting precincts and the voting wards of the city of Knoxville mean such voting precincts and voting wards as they were delineated on May 1, 1973.

(8) Senate district 8. Blount, Loudon and Sevier Counties.

(9) Senate district 9. Bradley, McMinn, Monroe, and Polk Counties.

(10) Senate district 10. The following Hamilton County voting districts: Bakewell, Daisy, Dallas, Fairmount, Falling Water, Ganns, Grandview, Hixson, Lookout Mountain, Lupton City, Mowbrary, Red Bank/White Oak-1, Red Bank/White Oak-2, Red Bank/White Oak-3, Sale Creek, Signal Mountain, Soddy, Stuart Heights, Valdeau, Wauhatchie; and the following voting wards and precincts of the city of Chattanooga: The first ward, the first precinct of the seventh ward, second, third, fourth, fifth, and sixth wards, the second precinct of the seventh ward and the eighth, ninth, tenth, sixteenth, seventeenth, eighteenth, and nineteenth wards; and the fourth precinct of the twelfth ward.

(11) Senate district 11. The following Hamilton County voting districts: Amnicola, Apison, Birchwood, East Ridge-1, East Ridge-2, East Ridge-3, Harrison, Kingspoint, Meadowview, Ooltewah, Ridgeside, Snowhill, Tyner and Westview: and the following voting wards and precincts of the city of Chattanooga: The eleventh, thirteenth, fourteenth, fifteenth, twentieth, and twenty-fire wards and the first, second, third, and fifth precincts of the twelfth ward.

(12) Senate district 12. Campbell, Cumberland, Fentress, Meigs, Morgan, Rhea and Scott Counties.

(13) Senate district 13. Bledsoe, Clay, Dekalb, Jackson, Overton, Pickett, Putnam, Sequatchie, Van Buren and White Counties.

(14) Senate district 14. Coffee, Franklin, Grundy, Marion and Warren Counties.

(15) Senate district 15. Macon, Smith, Sumner, Trousdale and Wilson Counties.

(16) Senate district 16. Bedford, Cannon, Lincoln, Moore and Rutherford Counties.

(17) Senate district 17. Giles, Lawrence, Marshall, and Maury Counties.

(18) Senate district 18. That portion of Davidson County lying within councilmanic districts 3, 4, 6, 7, 8, 9, 10 and 11, and 2nd, 3rd, and 4th precincts of councilmanic district 1, and the 5th precinct of councilmanic district 5.

(19) Senate district 19. That portion of Davidson County lying within councilmanic districts 2, 17, 18, 19, 20, 21 and 27, the 1st precinct of councilmanic district 1, the 1st, 2nd, 3rd and 4th precincts of councilmanic district 5, the 2nd precinct of councilmanic district 26, and the 1st and 2nd precincts of councilmanic district 28.

(20) Senate district 21. That portion of Davidson County lying within councilmanic districts 12, 13, 14, 15, 16, 29, 30 and 31, and the 3rd, 4th, 5th, and 6th precincts of councilmanic district 28.

(21) Senate district 21. That portion of Davidson County lying within councilmanic districts 22, 23, 24, 25, 32, 33, 34 and 35, and the 1st and 3rd precincts of councilmanic district 26.

All references to councilmanic districts of Davidson County contained herein are to those districts as established as of March 1, 1972.

(22) Senate district 22. Cheatham, Houston, Montgomery, Robertson and Stewart Counties.

(23) Senate district 23. Benton, Dickson, Hickman, Humphreys, Lewis, Perry, Wayne and Williamson Counties.

(24) Senate district 24. Carroll, Henry, Lake, Obion and Weakley Counties.

(25) Senate district 25. Gibson and Madison Counties.

(26) Senate district 26. Chester, Decatur, Fayette, Hardeman, Hardin, Henderson and McNairy Counties.

(27) Senate district 27. Crockett, Dyer, Haywood, Lauderdale and Tipton Counties.

(28) Senate district 28. That portion of Shelby County lying within the Shelby County voting districts of McConnell and Woodstock and the following voting precincts of Memphis: 21-2, 21-3, 27-2, 39, 40-1, 40-2, 41-1, 41-2, 41-3, 42-1, 42-2, 43-1, 43-2, 43-3, 43-4, 52-1, 52-2, 52-3, 53-2, 62, 69-1, 69-2, 70-1, 70-2, 71-1, 71-2, 72-1, 72-3, 72-4.

(29) Senate district 29. That portion of Shelby County lying within the following voting precincts of Memphis: 1, 2, 5, 7, 12, 22, 23, 24, 11-1, 11-2, 14-1, 14-2, 13-1, 13-2, 13-3, 25-1, 25-2, 25-3, 26-2, 31-3, 31-4, 34-1, 34-2, 35-1, 35-2, 35-3, 49-1, 50-1 and 50-2.

(30) Senate district 30. That portion of Shelby County lying within the following voting precincts of Memphis: 16-1, 16-2, 16-3, 17-1, 17-2, 17-3, 17-4, 20-1, 20-2, 20-3, 21-1, 26-1, 27-1, 30, 31-2 31-1, 32, 33, 36-1, 36-2, 36-3, 37-1, 37-2, 38-2, 29-1, 29-2, 29-3, 28-1, 28-2, 45-1, 45-2, 45-3, 45-4, 44-4, 44-5, 47-1, 47-2, 47-3, 51, 59-1, 59-2, 59-3, 61-1, 61-2.

(31) Senate district 31. That portion of Shelby County lying within the following voting precincts of Memphis: 38-1, 38-3, 44-1, 44-2, 44-3, 46-1, 46-2, 46-3, 54-1, 54-2, 55-1, 55-2, 56-1, 56-2, 57, 58-1, 58-2, 58-3, 58-4, 58-5, 63-1, 63-2, 64, 65-1, 65-2, 66-1, 66-2, 67-1, 67-2, 68-2, 73-1, 73-2, 73-3, 74-2, 74-3, 74-4, 74-5.

(32) Senate district 32. That portion of Shelby County lying within the following Shelby County voting districts: Arlington, Bartlett, Brunswick, Capleville, Ellendale, Kerrville, Locke, Lucy, Millington, Raleigh, Scenic Hills,

Stewartville, Collierville, Cordova, Eads, Forest Hills, Germantown, Morning Sun, Mullins Ross Store, and the following city of Memphis voting precincts as they existed on July 4, 1973: 53-1, 60-5, 67-3, 68-1, 74-1, 80, 81, 83, 84, 85, 86, 87-1, 87-2, 88-1, 88-2.

(33) Senate district 33. That portion of Shelby County lying within the following city of Memphis voting precincts: 48, 49-2, 60-1, 60-2, 60-3, 60-4, 60-6, 75-1, 75-2, 75-3, 75-4, 75-5, 75-6, 76-1, 76-2, 76-3, 77-1, 77-2, 78-1, 78-2, 78-3, 79-1, 79-2, 79-3, 82-1, 82-2.

All references to the Shelby County wards and precincts contained herein are to those precincts and wards as established as of April 16, 1973, except the transfer from district 32 to district 28 of Memphis voting precinct 53-1 as it existed on July 4, 1973.

All references to enumeration districts are to those districts as so designated in the official 1970 federal census. A reference to a specific enumeration district includes that district in all of its parts although parts thereof may be designated by a letter of the alphabet in addition to its numerical designation.

It is the legislative intent that all senate districts shall be contiguous and, toward that end, if any enumeration or voting district or other geographical entity designated as a portion of a senate district is found to be noncontiguous with the large portion of the senate district it shall be constituted a portion of the senate district smallest in population to which it is contiguous.

A candidate for election to the office of senator shall be required to reside in the senatorial district from which he seeks to be elected for one (1) year immediately preceding the election.

STIPULATION OF POPULATION OF SENATE DISTRICTS

Both appellants and appellee stipulated that the optimum population per senate district in the State of Tennessee is 118,914. The following are the stipulated populations for each district and their stipulated percentage deviations from the average:

Senate District	Population	% Deviation From Average
1	118,705	−.18
2	127,329	+7.08
3	113,407	−4.63
4	131,359	+10.47
5	127,046	+6.84
6	125,773	+5.77
7	119,324	+0.34
8	116,251	−2.24
9	121,292	+2.00
10	124,761	+4.92
11	129,475	+8.88
12	110,173	−7.35
13	114,130	−4.02
14	118,041	−.73
15	123,262	+3.66
16	120,820	+1.60
17	112,582	−5.32
18	112,714	−5.21
19	109,925	−7.56
20	110,471	−7.10
21	114,767	−3.49

Senate District	Population	% Deviation From Average
22	118,194	−.61
23	118,546	−.31
24	116,344	−2.16
25	113,645	−4.43
26	118,452	−.39
27	112,697	−5.23
28	124,826	+4.97
29	120,969	+1.73
30	118,487	−.36
31	121,185	+1.91
32	118,016	−.75
33	118,628	−.24

QUESTION PRESENTED

Was the three judge district court correct in concluding the apportionment of the Tennessee State Senate to be unconstitutional and in requiring that the Tennessee State Senate District lines be redrawn, even though such reapportionment would result in the disenfranchisement of Tennessee voters?

STATEMENT OF THE CASE

Statute

In 1972, a three judge panel declared the apportionment statute of the Tennessee Legislature, including the Tennessee Senate, to be unconstitutional. *Kopald v. Carr*, 343 F. Supp. 51 (M.D. Tenn. 1972). That three judge panel allowed the General Assembly of the State of Tennessee time to reapportion itself. If the General Assembly had failed to act by July 1,

1973, then pursuant to its decision, the three judge court would have imposed a court-ordered plan of reapportionment. As a result the Tennessee General Assembly enacted Chapter 403, Tennessee Public Acts of 1973. The court in *Kopald* had required that an attack on this new reapportionment plan be made within thirty (30) days after its signing by the Governor:

> "If the General Assembly enacts a plan of reapportionment prior to July 1, 1973, and such plan is not challenged in this case within thirty (30) days after the signing thereof by the Governor, this case will be closed. If, however, no plan is enacted, or, if enacted, is successfully challenged, the court will formulate a reapportionment plan." *Kopald v. Carr, Supra* at 54.

No attack was made upon the new Tennessee State reapportionment plan. T.C.A. Section 3-102, as codified in 1978, is essentially identical to that plan with some subsequent minor amendments. (See footnote 1, p. 2, opinion of the District Court) Chapter No. 649, Tennessee Public Acts of 1974, Chapter No. 255, Tennessee Public Acts of 1975; Chapter No. 723, Tennessee Public Acts of 1976; and Chapter No. 690, Tennessee Public Acts of 1978. In 1979 the Tennessee General Assembly enacted amendments to T.C.A. § 3-102 in order to attempt to comply with the court's order (reproduced as appendix C).[1]

The Appellees and Their Claim

All four appellees alleged that they are citizens of the State of Tennessee, having registered to vote after the decisions in *Kopald v. Carr, Supra.* They also alleged that the apportion-

[1] The attached Senate Bill No. 712 was passed by both houses of the General Assembly on May 17, 1979 pursuant to Tennessee law, Article III, see 18 Constitution of Tennessee, said bill will not become law until ten days after its passage or until it is signed by the Governor.

ment of the Tennessee State Senate, established by Tennessee Code Annotated § 3-102, was unconstitutional and that the Tennessee Senate Districts did not meet the "one-man one-vote" test on contemplated by *Baker v. Carr,* 369 U.S. 186 (1962), and *Reynolds v. Sims,* 377 U.S. 533 (1964).

The Opinion of the District Court

The District Court determined that Tennessee Code Annotated Section 3-102 is unconstitutional because it does not "construct districts . . . as nearly of equal population as is practical." (Opinion Page 4.) Appellants presented to the court both in their brief and their oral argument the issue of disenfranchisement of voters. However, the District Court summarily dismissed this argument.

The three judge court held Tennessee Code Annotated Section 3-102 to be unconstitutional and enjoined the appellant from conducting or causing to be conducted elections of State Senators pursuant to its provisions. The court retained jurisdiction of the cause and mandated that it would enact its own apportionment plan if the Tennessee General Assembly failed to enact one prior to June 1, 1979. Attorneys fees were further awarded to the appellee, such award was to be determined and a separate hearing was to be held in the future.

ARGUMENT

This Appeal Presents Substantial Questions of Law Requiring Reversal by This Court of the Order Issued January 15, 1979 by the Court Below.

The Order of the District Court Will Result in Less Equal Representation of the Voter Than if Tennessee Code Annotated Section 3-102 Is Allowed to Remain Valid.

This case is one of a long line of reapportionment cases commencing with *Baker v. Carr*, 369 U.S. 186 (1962). In *Baker*, this court held that federal courts have jurisdiction to determine whether a State legislative apportionment act deprives its citizens of equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States. In 1964 this Court, in *Reynolds v. Sims*, 377 U.S. 533 (1964) declared that population is the starting place for considering legislative apportionment controversies and that the Equal Protection Clause of the United States Constitution requires substantially equal legislative representation for all citizens. Subsequently numerous apportionment cases have been presented to this Court. See *Gaffney v. Cummings*, 412 U.S. 749 (1973); *Mahan v. Howell*, 410 U.S. 315 (1973); *White v. Register*, 412 U.S. 755 (1973); *Wells v. Rockefeller*, 394 U.S. 542 (1969); *Chapman v. Meier*, 420 U.S. 1 (1975). This Court, however, has not ruled on the issues presented here.

Article II, Section 3 of the Constitution of the State of Tennessee provides four-year terms for Tennessee State Senators with only one-half of the Senators elected in each biennial election. This constitutional provisions reads as follows:

> "The legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people.

> Representatives shall hold office for two years and *Senators for four years from the day of the general election*, except that the Speaker of the Senate and the Speaker of the House of Representatives each shall hold his office of Speaker for two years or until his successor is selected and qualified, provided however, that in the first general election after the adoption of this amendment *Senators elected in districts designated by even numbers shall be elected for four years and those elected in districts designated by odd numbers shall be elected for two years*. In a county having more than one senatorial district the district shall be numbered consecutively." (Emphasis supplied.)

The Tennessee Constitution further provides that after each decennial census the General Assembly of the State of Tennessee shall reapportion its senatorial districts. In pertinent part Article II, Section 4 of the Constitution of Tennessee reads:

> "The apportionment of Senators and Representatives shall be substantially according to populations. After each decennial census made by the Bureau of Census of the United States is available the General Assembly of the State of Tennessee shall reapportion its senatorial districts . . ."

Only one State Senatorial election remains prior to the 1980 decennial census. Pursuant to Article II, Section 3 of the Tennessee Constitution only one-half of the senate districts will be able to elect state senators in that election. Therefore, any reapportionment plan ordered by the court or enacted by the General Assembly would affect only one-half of the Tennessee districts. An entire apportionment must take place after 1980 and therefore in senate districts not holding elections in 1980, elections will never be held pursuant to the district lines drawn pursuant to this court ordered reapportionment.

As a result some individuals could be denied the right to vote for State Senator for a period up to eight years. For instance

consider a hypothetical county A contained in senate district two. Senate district two normally conducts an election in 1980; its last election having been conducted in 1976. However, if the plan moves the citizens of county A to senate district 1 an election would not be conducted in county A until 1982. If the General Assembly so chooses to move county A back to Senate district two after its 1980 reapportionment, then county A citizens would be unable to vote until 1984, thereby allowing eight years to pass before the citizens of county A can vote for a State Senator.

Reproduced herein as appendix C is a statute recently enacted by the Tennessee General Assembly in response to the court order. Pursuant to this legislation territory in even-numbered senatorial districts have been transferred to odd-numbered senatorial districts, thereby disenfranchising individuals who normally would have voted in 1980, and possibly disenfranchising such individuals until 1984. (Only Senators in even-numbered districts stand for election in 1980.)

Senatorial District	Added Area	From Senatorial District
3	Sullivan County 14 Magisterial District	3
	14 Councilmanic District	
5	Knoxville ward: SH 19	6
7	Loudon County: Glendale precinct	8

Senatorial District	Added Area	From Senatorial District
	Knoxville wards: East 17, West 17 FH 19	
	Blount County	8
9	Meigs County Magisterial District 1, 2, 3, 4	12
13	Fentress County, Scott County: Magisterial District 4, 6, 7	12
17	Lincoln County	16
	Bedford County	16
19	Davidson County: Councilmanic District 6-1	18
25	Henderson County: Magisterial District 1, 3, 4	26
27	Shelby County districts: Stewartsville, Arlington, Brunswick (Lakeland) Kerrville, Eads	32
29	Memphis wards: 27-2 (3100) 39 (4340)	28

While the appellants admit that the population deviations in the pre-1979 apportionment plan do not strictly conform

to "one-man one-vote", the appellants insist that pursuant to this Court's prior rulings the above disenfranchisement creates a relative factor to be considered. This Court in *Gaffney v. Cummings, Supra* at 39 stated:

> "There are other relevant factors to be taken into account and other important interests that states may legitimately be mindful of. An unrealistic over-emphasis on raw population figures, a new nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that day-to-day operation are important to an acceptable representation and apportionment arrangement.
>
> Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment bodied in the original plan. From the very outset, we recognize that the apportionment task dealing as it must with fundamental choices about the nature of representation, is primarily a political and legislative process. We doubt that the 14th Amendment requires repeated displacement of other appropriate state decision making in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say would deprive any person a fair and effective representation in his state legislation." (Citations omitted.)

See also *Mahan v. Howell, Supra; Dush v. Davis,* 387 U.S. 112 (1967); *Sailors v. Board of Education,* 387 U.S. 105 (1967); *Burns v. Richardson,* 384 U.S. 73 (1972).

Therefore pursuant to *Gaffney,* factors other than population deviation are to be considered in determining whether legislative districts are mal-apportioned. The disenfranchisement of voters resulting from any reapportionment at this late date is clearly such an additional factor. The discrimination resulting from such apportionment is even more invidious than any possible discrimination arising from the pre-1979 status of the Tennessee State. The three judge court has thus disenfranchised the voters of the State of Tennessee and created a more unconstitutional situation than if T.C.A. § 3-102, as codified in 1978, were allowed to remain valid. Therefore, appellants submit that the order of the three judge court below should be reversed.

CONCLUSION

The above premises considered, this court should note probable jurisdiction and summarily reverse the order of the court below, dated January 15, 1979 or, in the alternative, should grant plenary consideration to the instant appeal.

Respectfully submitted,

ROBERT B. LITTLETON
Deputy Attorney General

WILLIAM W. HUNT, III
Assistant Attorney General

Certificate of Service

I hereby certify that a true and exact copy of the foregoing brief has been forwarded to John L. Ryder, Esq., Laughlin, Halle, Regan, Clark & Gibson, 2201 First Tennessee Bank Bldg., Memphis, Tennessee 38103, on this the 25th day of May, 1979.

William W. Hunt, III

APPENDIX

APPENDIX A

United States District Court for the
Middle District of Tennessee
Nashville Division

Richard Mader, Patricia Mae Norton, Mary Richardson, Marsena Darlene Walker vs. Gentry Crowell, Secretary of State of the State of Tennessee; Ray Blanton, Governor of the State of Tennessee, Brooks McLemore, Attorney General of the State of Tennessee, David Collins, Coordinator of Elections of the State of Tennessee; and James E. Harpster, Jack C. Seaton, Tommy Powell, Richard Holcomb, and Lytle Landers, Commissioners of the State Board of Elections	No. 78-3079-NA-CV

(Filed January 15, 1979)

Before: PHILLIPS, Chief Circuit Judge, BROWN, Chief District Judge, and MORTON, Chief District Judge.

PER CURIAM.

Plaintiffs in this class action are Tennessee voters seeking reapportionment of the state senatorial districts, which they allege are unconstitutionally apportioned pursuant to Tennessee Code Annotated section 3-102. The suit is brought pursuant to 42 U.S.C. §§ 1983 and 1988, and jurisdiction is conferred

upon this court by 28 U.S.C. § 1343(3). A panel of three judges was designated pursuant to 28 U.S.C. § 2284. The court finds that this cause meets the requirements for a class action set out in Rule 23 of the Federal Rules of Civil Procedure.

Plaintiffs assert that the present plan of apportionment of state senatorial districts violates the one person, one vote mandate of *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), and *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1392, 12 L. Ed. 2d 506 (1964). This plan was enacted by the Tennessee General Assembly in 1973 after two prior plans (a primary plan and an alternate plan) had been declared unconstitutional in *Kopald v. Carr*, 343 F. Supp. 51 (M.D. Tenn. 1972). Because there was not time after the *Kopald* decision for the legislature to enact a new plan before the 1972 elections, the court ordered that its own plan, a modified version of the General Assembly's alternate version, be used for those elections only. The court recognized, however, that legislative apportionment is primarily and properly a legislative function, *id.* at 53, and stated:

> If the General Assembly enacts a plan of reapportionment prior to July 1, 1973, and such plan is not challenged in this case within thirty (30) days after the signing thereof by the Governor, this case will be closed. If, however, no plan is enacted, or, if enacted, is successfully challenged, the court will formulate a reapportionment plan.

Id. at 54. As indicated above, the General Assembly responded by enacting the plan that is basically still in effect.[1]

---

[1] With the exception of the so-called "Gillock Amendment," which was held unconstitutional in *Brawner v. Crowell*, 434 F. Supp. 1119 (1977), amendments to the plan since 1973 were enacted when precinct configurations or designations were altered, necessitating changes in the descriptions of senatorial districts in order to maintain the district lines as originally enacted.

Counsel for defendants argues that plaintiffs are barred by laches, asserting that the *Kopald* court "stated that an attack on the reapportionment would be barred if plaintiffs did not challenge [the General Assembly's] plan within 30 days," Defendants' Reply Brief and Argument, filed November 3, 1978, at 3. This overstates the *Kopald* decision, which provided that that case would be closed if no challenge promptly appeared. The present individual plaintiffs were not registered voters at that time and so were not members of the *Kopald* plaintiff class. It is stipulated that each of the individual plaintiffs registered to vote in Tennessee for the first time in 1975 or later. Each was only eligible to vote in one major election before filing this suit, and thus plaintiffs are not guilty of laches. Any considerations of finality of judgment or of the desirability of maintaining a stable apportionment scheme are outweighed by the importance of plaintiffs' rights to vote and to have their votes count equally with those of other voters throughout the state.

The following facts pertinent to the merits of this case are stipulated:

(1) Population figures are based on the 1970 Federal Decennial Census.

(2) 1970 census population figures for voting precincts are interpolations prepared by the Office of Legal Services of the Tennessee General Assembly and derived in part from local authorities.

(3) The optimum population per senatorial district based on the 1970 census is 118,914 (total Tennessee population of 3,924,164 divided by 33 districts).

(4) The gross maximum deviation from the optimum under Tennessee Code Annotated section 3-102 is 18.03 percent, being the total of the greatest positive deviation, +10.47 percent (Senate District 4, population 131,356), and the greatest nega-

tive deviation, —7.56 percent (Senate District 19, population 109,925).[2]

Senate District Senate District	Population Population	Deviation Deviation
1	118,705	−.18
2	127,329	+7.08
3	113,407	−4.63
4	131,359	+10.47
5	127,046	+6.84
6	125,773	+5.77
7	119,324	+0.34
8	116,251	−2.24
9	121,292	+2.00
10	124,761	+4.92
11	129,475	+8.88
12	110,173	−7.35
13	114,130	−4.02
14	118,941	−.73
15	127,329	+3.66
16	120,820	+1.60
17	112,582	−5.32
18	112,714	−5.21
19	109,925	−7.56
20	110,471	−7.10
21	114,767	−3.49
22	118,194	−.61
23	118,546	−.31
24	116,344	−2.16
25	113,645	−4.43
26	118,452	−.39
27	112,697	−5.23
28	124,826	+4.97
29	120,969	+1.73
30	118,487	−.36
31	121,185	+1.91
32	118,016	−.75
33	118,628	−.24

It is the opinion of this court that Tennessee Code Annotated section 3-102 is unconstitutional because it does not

[2] The following table, stipulated in this case, lists each senate district and its percentage deviation from the optimum:

"construct districts . . . as nearly of equal population as is practicable." *Reynolds v. Sims, supra,* 377 U.S. at 577. The practicality of smaller deviations was demonstrated when the 1972 elections were held pursuant to the *Kopald* plan, under which the variance from the optimum was below four percent. *See Kopald v. Carr, supra,* 343 F. Supp. at 53. It is true that sizable deviations have been allowed where such variations are justified by "legitimate considerations incident to the effectuation of a rational state policy." *See, e.g., Mahan v. Howell,* 410 U.S. 315, 325, 93 S. Ct. 979, 35 L. Ed. 2d 320 (1973) (*quoting Reynolds v. Sims, supra,* 377 U.S. at 579). In *Mahan,* the court upheld a deviation of 16.4 percent where it was found to be in furtherance of the state's "policy of maintaining the integrity of political subdivision lines." *Id.,* 410 U.S. at 325.

It is clear that the burden is on the state to prove a policy justification for the deviations complained of in the instant case. In *Wells v. Rockefeller,* 394 U.S. 542, 89 S. Ct. 1234, 22 L. Ed. 2d 535 (1969), the Supreme Court held that the burden is on the proponent of a districting plan to justify deviations. *Id.,* 394 U.S. at 544. Concededly, this principle was significantly qualified in *Gaffney v. Cummings,* 412 U.S. 735, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973), which emphasized that stricter standards must be applied to congressional districting such as was involved in *Wells* than to districting for state legislative bodies, and which held that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Id.,* 412 U.S. at 745. The *Gaffney* Court indicated that deviations from the optimum district size may be categorized into three groups: those "too great to be justified by any state interest," "minor deviations" not calling for state justification, and, most significant for the case at bar, deviations "sufficiently large to require justification." *Id.* The case cited by the court as an example of this intermediate group

was *Mahan v. Howell, supra,* with its maximum deviation of 16.4 percent. The finding in *Mahan* was based on facts offered by the state, and the court noted that in *Swann v. Adams,* 385 U.S. 440, 87 S. Ct. 569, 17 L. Ed. 2d 501 (1967), a large deviation was disapproved where the state "offered no evidence at the trial level to support the challenged variations. . . ." *Mahan, supra,* 410 U.S. at 328.

The 18.03 percent variance now at issue certainly falls in the *Mahan* category, yet in this case, unlike *Mahan,* no justification has been proved by the state. Although defendants point out that Article 2, section 6 of the Tennessee Constitution "prefers districts that contain whole contiguous counties," (Defendants' Reply Brief and Argument, filed November 3, 1978, at 7), defendants have failed to indicate how the plan under attack furthers this preference or even that the preference rises to the level of an established state policy. Tennessee Code Annotated section 3-102 creates a number of districts that cut across county lines, and several of these districts deviate markedly from the optimum. Although *Mahan* teaches that other policy considerations might justify exceptions to a general policy of observing existing political boundaries, no such justifications have been identified for the noncontiguous districts now existing in this state.

It having been demonstrated that Tennessee senatorial districts with substantially smaller deviations from the optimum are practicable and that the magnitude of the variations created by the present plan is without justification, this court holds that Tennessee Code Annotated section 3-102 is unconstitutional. Defendants are enjoined from conducting or causing to be conducted any primary or general election of state senators pursuant to its provisions. The court will retain jurisdiction of this cause, and if the Tennessee General Assembly has not enacted a constitutional scheme of apportionment of state senatorial districts prior to June 1, 1979, the court will reinstate the

Kopald plan[3] or will effectuate such other plan as may be presented to the court that surpasses the *Kopald* plan in achieving the ideal of one person, one vote.

Plaintiffs seek attorney fees pursuant to 42 U.S.C. § 1988, as amended by the Civil Rights Attorney's Fee Awards Act of 1976, which provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

It is the opinion of this court that such a fee should be awarded in this case. A separate hearing will be held to determine the amount to be so awarded.

An appropriate order will be entered.

For the Court:

/s/ L. CLURE MORTON
Chief District Judge

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[3] If it becomes necessary for the court to impose the *Kopald* plan, any modifications required by changes in the configurations or designations of voting precincts used to define the districts in that plan will, of course, be made.

ORDER

In accordance with the memorandum contemporaneously filed, it is hereby ORDERED that:

(1) Tennessee Code Annotated section 3-102, State senatorial districts—Residence requirements, is declared unconstitutional;

(2) Defendants and their successors in office are enjoined from conducting or causing to be conducted any primary or general election pursuant to the provisions of Tennessee Code Annotated 3-102;

(3) The court retains jurisdiction of this action, and in the event no constitutional plan of apportionment of Tennessee senatorial districts is enacted by the General Assembly by June 1, 1979, this court will impose a plan of apportionment;

(4) A reasonable attorney's fee will be awarded as part of the costs taxed to defendants, and a hearing to determine the amount of said fee will be held on a date to be determined.

For the Court:

/s/ L. CLURE MORTON
Chief District Judge

ORDER AMENDING MEMORANDUM

In accordance with the **Amendment to Stipulation** filed by the parties to this cause on May 1, 1979, it is hereby ORDERED that this Court's memorandum opinion entered January 15, 1979, be amended as follows: In footnote 2 of said memorandum, the population listed for Senate District 14 shall be changed from 118,941 to 118,041, and the population listed for Senate District 15 shall be changed from 127,329 to 123,262.

FOR THE COURT:

/s/ L. CLURE MORTON
Chief District Judge

ORDER

Before PHILLIPS, Senior Circuit Judge, BROWN, Chief District Judge, and MORTON, Chief District Judge.

On January 15, 1979, this court entered an order enjoining the defendants and their successors in office from conducting any primary or general election for State Senator pursuant to the provisions of T.C.A. § 3-102 pending further order of the court.

The plaintiffs and defendants through their attorneys of record, have filed a joint petition that the order of January 15, 1979, be modified, so as to exempt therefrom the holding of a special primary election on March 1, 1979, and a special general election on April 17, 1979, for State Senator from the Eighteenth Senatorial District to fill the vacancy created by the resignation of former State Senator Bill Boner, now a member

of the House of Representatives of the Congress of the United States. Said special primary and general election were scheduled pursuant to Writs of Election issued by the Governor of Tennessee on January 5, 1979.

Upon consideration, it is ORDERED that the relief sought by the joint petition be granted and that the order of this court entered January 15, 1979, be and hereby is amended by adding at the end of paragraph (2) thereof the following:

> Provided, however, that there is exempted from the injunction issued pursuant to this paragraph the special primary and general elections previously scheduled to fill a vacancy in the office of State Senator for the Eighteenth Senatorial District.

For the court:

/s/ HARRY PHILLIPS
Senior Circuit Judge

Approved for Entry:

/s/ JOHN L. RYDER

Counsel for Plaintiffs

/s/ WILLIAM W. HUNT III
Assistant State Attorney General
Counsel for Defendants

APPENDIX B

United States District Court for the
Middle District of Tennessee
Nashville Division

Richard Mader, et al.,

v.

Gentry Crowell, Secretary of State of the State of Tennessee; et al.

No. 78-3079-NA-CV

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the above-named defendants hereby appeal to the Supreme Court of the United States from the order entered in this action on January 15, 1979. This appeal is taken pursuant to 28 U.S.C. Sec. 1253.

Respectfully submitted,

/s/ WILLIAM W. HUNT, III
Assistant Attorney General

Certificate of Service

I hereby certify that a true and exact copy of the foregoing has been mailed to John L. Ryder, Esq., 201 First Tennessee Bank Building, Memphis, Tennessee 38103 this 14th day of February 1979.

/s/ William W. Hunt, III
Assistant Attorney General

APPENDIX C

SENATE BILL NO. 712

By Hamilton, Crouch, Mr. Speaker Wilder

Substituted for: House Bill No. 604
By Burnett (Fentress)

AN ACT To amend Tennessee Code Annotated, Section 3-102, relative the reapportionment of the State Senate.

WHEREAS, It is the intent of the General Assembly of the State of Tennessee to equitably apportion itself with due consideration to Sections 5 and 6 of Article II of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 3-102, is amended by deleting the section in its entirety and substituting in lieu thereof the following:

State Senatorial Districts-Residence Requirements.—Until the next enumeration of qualified voters and apportionment of senators, the state senatorial districts shall be composed as follows:

All subdistrict lines cited in the following descriptions are those in effect as of May 1, 1979, unless otherwise noted.

(1) Senate District 1. Carter and Johnson Counties and that portion of Washington County which is not established as a portion of Senate District 3, as set out hereinafter.

(2) Senate District 2. All of Sullivan County except voting precincts 14 MP and 14 CH.

(3) Senate District 3. Greene, Hawkins, Unicoi Counties, Sullivan County voting precincts 14 MP and 14 CH, that portion of Washington County lying within the Sulphur Springs census division and the Telford census division, and Hancock County magisterial districts 5, 6, 7, 8, 9, 10 and 12.

(4) Senate District 4. Grainger, Hamblen, Jefferson, Cocke and Union Counties, Hancock County magisterial districts 1, 2, 3, 4 and 11, and Claiborne County magisterial districts 3 and 4.

(5) Senate District 5. Anderson County, the following voting wards of the City of Knoxville: SH 19, 36, 37, 38, 39, 40 and 41, and the following voting precincts of Knox County; Corryton, Dante, Fort Sumpter, Gibbs, Brickey, Heiskell, Hills, Pedigo, Halls, Powell, Karns and Solway.

(6) Senate District 6. The following voting precincts of Knox County: Huffs, Sunnyview, Ramsey, Riverdale, Dora Kennedy, Ellistown, Maloneyville, Shannondale, Ritta, Skaggston, Carter, Thorngrove, Kings, Mount Olive, Rocky Hill, Sevier Homes, Vestal, Gap Creek and Hopewell, and the following voting wards of the City of Knoxville; 13, Middle 14, East 14, East 15, West 15, South 16, North 16, FH 25, 25 Vestal, East 26, West, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 49.

(7) Senate District 7. The following voting precincts of Knox County: Lonas, Hardin Valley, Concord, Farragut, Cedar Bluff, Bluegrass and Ball Camp, the following voting wards of the City of Knoxville: 1, 6, 7, 8, 9, North 10, South 10, East 11, Middle 11, West 11, 12, East 17, West 17, 18, FH 19, 20, 21, 22, South 23, North 23, South 24, North 24, Seq. 24, 42, 43, 44, 45, 46, 47, 48, North 50, South 50 and 51, the Glendale precinct

of Loudon County, and the following precincts of Blount County: Binfield, Maryville E. College, Maryville Jr. High, Fairview City, Fairview, Friendsville City, Friendsville, Miser Station, Alcoa High School, Louisville School and Mentor.

(8) Senate District 8. Sevier and Monroe Counties, all of Blount except that in Senate District 7, and all of Loudon County except that in Senate District 7.

(9) Senate District 9. Bradley, Polk and McMinn Counties, Meigs County magisterial districts 1, 2, 3 and 4, and the following voting precincts of Hamilton County: Bakewell, Dallas, Lakesite, Middle Valley, Mowbray, Sale Creek and Soddy Daisy North.

(10) Senate District 10. The following Hamilton County voting precincts: Airport, Alton Park, Amnicola, Avondale, Bushtown, City Hall, Court House, Downtown, Dupont, Eastdale, Falling Water, Glenwood, Howard, Lupton City, Moccasin Bend, Mountain Creek, North Chattanooga, North Woods, Orchard Knob, Piney Woods, Riverview, St. Elmo, Stuart Heights, Valdeau City, Valley View City, Wauhatchie City, Fairmount, Falling Water County, Lookout Mountain, Red Bank 1, Red Bank 2, Red Bank 3, Red Bank 4, Signal Mountain East, Signal Mountain West, Soddy Daisy South, Valdeau County, Valley View County, Walden and Wauhatchie County.

(11) Senate District 11. The following Hamilton County voting precincts: Bonny Oaks, Brainerd, Brainerd Hills, Cedar Hills, Clifton Hills, Concord, East Brainerd, East Chattanooga, East Lake, East Side, Eastgate, Highland Park, Hixon, Kingpoint, Lake Hills, Missionary Ridge, Murray Hills, Northgate, Ridgedale, Sunnyside, Tyner, Woodmore, Apison, Birchwood, Collegedale, East Ridge 1, East Ridge 2, East Ridge 3, East Ridge 4, East Ridge 5, Harrison, Meadowview, Ooltewah, Ridgeside, Snowhill and Westview.

(12) Senate District 12. Cumberland, Morgan and Campbell Counties, all of Roane County except Glen Alice, Fairview, Midway, Paint Rock, Renfro and Johnson School House precincts of Roane County, all of Claiborne County except that portion in Senate District 4, and Scott County magisterial districts 1, 2, 3 and 5.

(13) Senate District 13. Putnam, Jackson, Clay, Overton, Pickett, Fentress, White, DeKalb and Van Buren Counties, and Scott County magisterial districts 4, 6 and 7.

(14) Senate District 14. Bledsoe, Rhea, Sequatchie, Marion, Warren and Franklin Counties, Meigs County magisterial district 5, all of Grundy County except magisterial district 3, and that portion of Roane County lying in the Glen Alice, Fairview, Midway, Paint Rock, Renfro and Johnson School House precincts.

(15) Senate District 15. Sumner, Macon, Trousdale and Smith Counties, and Wilson County except magisterial districts 2, 11, 13 and 16.

(16) Senate District 16. All of Moore, Rutherford, Cannon and Coffee Counties, magisterial district 3 of Grundy County, and that part of Lincoln County not included in Senate District 17.

(17) Senate District 17. All of Marshall, Giles, Maury and Bedford Counties, and that portion of Lincoln County in magisterial districts 1, 2, 4 and the Howell Hill and Lincoln precincts of magisterial district 8.

(18) Senate District 18. That portion of Davidson County lying within councilmanic districts 3, 4, 7, 8, 9, 10 and 11, the 2nd, 3rd, 4th, 5th and 6th precincts of councilmanic district 1, the 1st precinct of councilmanic district 5, the 2nd and 3rd precincts of councilmanic district 6, and the 1st and 4th precincts of councilmanic district 22.

(19) Senate District 19. That portion of Davidson County lying within councilmanic districts 2, 17, 18, 19, 20 and 21, the 1st precinct of councilmanic district 1, the 2nd, 3rd and 4th precincts of councilmanic district 5, the 1st precinct of councilmanic district 6, the 1st and 2nd precincts of councilmanic district 26, the 1st, 2nd and 3rd precincts of councilmanic district 27 and the 1st precinct of councilmanic district 28.

(20) Senate District 20. That portion of Davidson County lying within councilmanic districts 12, 13, 14, 15, 16, 29, 30 and 31, the 2nd, 3rd and 4th precincts of councilmanic district 28, and the 5th precinct of councilmanic district 32, and Wilson County magisterial districts 2, 11, 13 and 16.

(21) Senate District 21. That portion of Davidson County lying within councilmanic districts 23, 24, 33, 34 and 35, the 2nd precinct of councilmanic district 22, the 1st, 2nd, 3rd, 4th and 5th precincts of councilmanic district 25, the 3rd precinct of councilmanic district 26, the 5th precinct of councilmanic district 27, and the 1st, 2nd, 3rd and 4th precincts of councilmanic district 32, Cheatham County magisterial districts 6 and 7, and Dickson County except magisterial districts 2 and 7.

(22) Senate District 22. Montgomery, Robertson, Stewart and Houston Counties, Cheatham County magisterial districts 1, 2, 3, 4 and 5, and Humphreys County magisterial districts 1, 2 and Plant precinct of magisterial district 4.

(23) Senate District 23. Hickman, Williamson, Lewis, Lawrence and Benton Counties, Humphreys County except magisterial districts 1 and 2 and Plant precinct of magisterial district 4, Dickson County magisterial districts 2 and 7, and Wayne County except Beech Creek voting precinct.

(24) Senate District 24. Lake, Obion, Weakley, Henry and Carroll Counties and the following portions of Dyer County: Bogota and 5th consolidated precincts of magisterial district D.

(25) Senate District 25. Madison and Gibson County and Henderson County magisterial districts 1 and 3.

(26) Senate District 26. Fayette, Hardeman, McNairy, Hardin, Chester, Perry and Decatur Counties, Henderson County except magisterial districts 1 and 3, and Beech Creek voting precinct of Wayne County.

(27) Senate District 27. Tipton, Haywood, Lauderdale and Crockett Counties, Dyer County except the following portions: Bogota and 5th consolidated precincts of magisterial district D, and that portion of Shelby County lying within the following Shelby County voting districts: Stewartsville, Arlington, Brunswick, Kerrville, Lakeland and Eads.

(28) Senate District 28. That portion of Shelby County lying within the Shelby County voting districts of McConnell and Woodstock and the following voting precincts of Memphis: 21-2, 21-3, 40-1, 40-2, 41-1, 41-2, 41-3, 42-1, 42-2, 43-1, 43-2, 52-1, 52-2, 52-3, 53-1, 53-2, 53-3, 62-1, 62-2, 69-1, 69-2, 70-1, 70-2, 70-3, 71-1, 71-2, 71-3, 72-1, 72-2, 72-3, 72-4, 72-5, 72-6.

(29) Senate District 29. That portion of Shelby County lying within the following voting precincts of Memphis: 1, 2, 7, 11-1, 11-2, 12, 13-1, 13-2, 13-3, 14-1, 14-2, 15, 18, 22, 25-1, 25-2, 25-3, 26-1, 27-1, 27-2, 27-3, 32, 34-2, 35-1, 35-2, 35-3, 39, 49-1 50-1, 51.

(30) Senate District 30. That portion of Shelby County lying within the following voting precincts of Memphis: 16-1, 16-2, 16-3, 17-1, 17-2, 20-1, 20-2, 20-3, 21-1, 28-1, 28-2, 29-1, 29-2, 30, 31-1 31-2, 31-3, 31-4, 33, 36-1,

36-2, 36-3, 37, 38-2, 44-4, 44-5, 45-1, 45-3, 45-4, 47-1, 47-2, 47-3, 45-2, 59-1, 59-2, 59-3, 61-1, 61-2.

(31) Senate District 31. That portion of Shelby County lying within the following voting precincts of Memphis: 38-1, 38-3, 44-1, 44-2, 44-3, 46-1, 46-2, 46-3, 54-1, 54-2, 55-1, 55-2, 56-1, 56-2, 57, 58-1, 58-2, 58-3, 58-4, 58-5, 63-1, 63-2, 64-1, 64-2, 65-1, 65-2, 66-1, 66-2, 67-1, 67-2, 68-2, 68-3, 73-1, 73-2, 73-3, 73-4, 73-5, 74-2, 74-3, 74-4, 74-5, 74-7, 74-8, 74-9.

(32) Senate District 32. That portion of Shelby County lying within the following Shelby County voting districts: Bartlett 1, Bartlett 2, Bartlett 3, Bartlett 4, Capleville, Collierville 1, Collierville 2, Cordova, Forest Hills, Germantown 1, Germantown 2, Germantown 4, Germantown 5, Germantown 6, Germantown 7, Hickory Hill, Locke, Lucy, Millington 1, Millington 2, Morning Sun, Mullins, Ross Store, and the following City of Memphis voting precincts: 60-2, 60-5, 60-7, 67-3, 68-1, 73-6, 74-1, 74-6, 78-5, 79-6, 80, 81-1, 81-2, 81-3, 81-4, 83, 84, 85, 86, 87-1, 87-2, 87-3, 88-1, 88-2, 89-1, 89-2, 90-1, 90-2.

(33) Senate District 33. That portion of Shelby County lying within the following City of Memphis voting precincts: 26-2, 34-1, 48, 49-2, 50-2, 60-1, 60-3, 60-4, 60-6, 60-8, 75-1, 75-2, 75-3, 75-4, 75-5, 75-6, 75-7, 75-8, 76-1, 76-2, 76-3, 76-4, 76-5, 77-1, 77-2, 77-3, 78-1, 78-2, 78-3, 78-4, 79-1, 79-2, 79-3, 79-4, 79-5, 82-1, 82-2, 82-3.

All references to enumeration districts are to those districts as so designated in the official 1970 federal census. A reference to a specific enumeration district includes that district in all of its parts although parts thereof may be designated by a letter of the alphabet in addition to its numerical designation.

It is the legislative intent that all senate districts shall be contiguous and, toward that end, if any enumeration

or voting district or other geographical entity designated as a portion of a senate district is found to be non-contiguous with the larger portion of the senate denate district, it shall be constituted a portion of the senate district smallest in population to which it is contiguous.

SECTION 2. A candidate for election to the office of senator shall be required to reside in the senatorial district from which he seeks to be elected for one (1) year immediately preceding the election.

SECTION 3. Senators and representatives elected to the Ninety-first General Assembly shall, until the next general election of members of the General Assembly, represent their respective districts as constituted prior to the effective date of this act. At the November, 1980, general election and thereafter until changed by law, senators and representatives shall be elected to represent districts as provided in this act.

However, nothing herein shall be construed as depriving any member of the Senate of the Ninety-first General Assembly of his office or as affecting or modifying the requirements of staggered senatorial terms or any other provisions of Article II, Section 3 of the Constitution of Tennessee, and those senators elected in districts designated by odd numbers in the General Election of 1978 shall continue to represent their respective districts as constituted both before and after the effective date of this act, until the election of their successors at the November, 1982 general election.

SECTION 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 5. This act shall take effect on becoming law, the public welfare requiring it.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-1780

GENTRY CROWELL, Secretary of State of the State of Tennessee; RAY BLANTON, Governor of the State of Tennessee and his successors in office; BROOKS McLEMORE, Attorney General of the State of Tennessee and his successors in office; DAVID COLLINS, Coordinator of Elections of the State of Tennessee; and JAMES E. HARPSTER, JACK C. SEATON, TOMMY POWELL, RICHARD HOLCOMB, and LYTLE LANDERS, Commissioners of the State Board of Elections,
Appellants,

vs.

RICHARD MADER, PATRICIA MAE NORTON, MARY RICHARDSON and MARSENA DARLENE WALKER,
Appellees.

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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IN THE

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vs.

RICHARD MADER, PATRICIA MAE NORTON, MARY RICHARDSON and MARSENA DARLENE WALKER,
Appellees.

MOTION OF APPELLEES TO DISMISS OR AFFIRM

The appellees, Richard Mader, Patricia Mae Norton, Mary Richardson, and Marsena Darlene Walker, respectfully move to dismiss or affirm the judgment of the United States District Court for the Middle District of Tennessee in this case. Rule 16(1)(c) and (d).

STATEMENT OF THE CASE

This is a direct appeal from an order granting a permanent injunction and entered on January 15, 1979, by a District Court of three judges specially constituted pursuant to 28 USC §2284. Plaintiffs sought certification of the cause as a class action and the District Court found that the cause met the requirements for a class action as set out in Rule 23 of the Federal Rules of Civil Procedure.

Following the 1970 Federal Decennial Census, the Tennessee General Assembly enacted two alternative plans of apportionment. (Acts 1970, Ch. 381) The second alternative plan was to take effect in the event that the first plan was held unconstitutional. The State of Tennessee acknowledged, in the case of *Kopald v. Carr*, 343 F.Supp. 51, (M.D.Tennessee.1972), that both plans were, in fact, unconstitutional. Id at 52. The District Court in the *Kopald* case, ordered the 1972 elections to be conducted in accordance with the second alternative plan as modified by the Court. Id. at 53. This modified plan reduced the gross variance from the ideal district size to less than 4%. Gross variance is computed by adding the highest positive percentage deviation to the lowest negative deviation. The District Court retained jurisdiction of the case pending legislative action during the 1973 Session.

Following the 1972 elections, the General Assembly adopted a new plan of apportionment for the Senate, which created gross variations from the optimum district size of nearly 18%. Acts 1973, Ch. 403. This plan was codified as Tennessee Code Annotated Section 3-102, and was the plan of apportionment challenged in this case below. Elections were held in 1974 and 1976 pursuant to the plan of apportionment adopted by the legislature in 1973.

It has been stipulated by the parties that each of the appellees registered to vote in 1975 or 1976. None of the appellees in the case were registered to vote during the pendency or at the time of the decision rendered in *Kopald v. Carr, supra*.

This action was commenced on March 8, 1978. Appellees filed a motion for an early hearing date, noting the approach of the 1978 General Elections. This motion was denied, and the matter was heard before a panel of three judges on November 15, 1978. The District Court rendered its opinion on January 15, 1979, finding that TCA 3-102, as enacted was unconstitutional. The order of the Court entered in accordance with the memorandum opinion, enjoins the defendants from conducting any election in accordance with the plan of apportionment set forth in TCA § 3-102 as it existed at that time. Furthermore, the Court retained jurisdiction of the matter, stating: "And in the event no constitutional plan of apportionment of Tennessee Senatorial Districts is enacted by the General Assembly by June 1, 1979, this Court will impose a plan of apportionment." Appellants Jurisdictional Statement at A-8.

On May 17, 1979, Senate Bill No. 712 was passed by both Houses of the General Assembly. The bill was transmitted to the Governor of Tennessee on Friday, May 25, 1979. Pursuant to the Tennessee Constitution, Article III, Section 18, the Bill became law on June 6, 1979, the Governor having returned said bill to the Secretary of State without his signature. Senate Bill 712 amends Tennessee Code Annotated § 3-102, "by deleting the section in its entirety and substituting in lieu thereof" an entirely new plan of apportionment. (See Appendix A.)

MOTION TO DISMISS

The Appellees hereby move to dismiss the appeal on the ground that no justiciable case or controversy exists within the meaning of Article III of the Constitution of the United States. The non-justiciability of this appeal is obvious for two reasons: (1) The statute upon which appellants base their claim has now been repealed; and (2) consideration of Senate Bill 712 is premature.

A. **The statute upon which appellants base their claim has been repealed.**

The three-judge court below held that Tennessee Code Annotated Section 3-102 is unconstitutional. The Court further granted an injunction enjoining defendants "from conducting or causing to be conducted any primary or general election of state senators pursuant *to its provisions*." (emphasis supplied) Appellants' Jurisdictional Statement, A-6. Since the date of the Court's order, the Tennessee General Assembly has enacted an amendment to TCA 3-102 which deletes the existing plan of apportionment in its entirety and substitutes therefor an entirely new plan of apportionment. Therefore, any election held pursuant to TCA 3-102, as presently in effect, would not violate the terms of the injunction. To see clearly the mootness of appellants' appeal, one has only to consider that an order of this Court reversing the decision of the Court below would not reinstate or revive the prior plan of apportionment.

Under familiar principles, this Court must review the order of the District Court in light of Tennessee law as it now stands, not as it stood when the order below was entered. *Diffenderfer v. Central Baptist Church of Miami*, 404 U.S. 412, 92 S.Ct. 574, 30 L. Ed. 2d 567 (1972); *Hall v. Beals*, 396 U.S. 45,

90 S.Ct. 200, 24 L.Ed.2d 214 (1969); *United States v. Alabama*, 362 U.S. 602, 80 S.Ct. 924, 4 L.Ed.2d 982 (1960); *United States v. Alaska S.S. Co.*, 253 U.S. 113, 40 S.Ct. 448 (1920). Since Senate Bill 712 (Public Chapter 443, Acts of 1979) repeals the reapportionment plan which was declared unconstitutional by the District Court, the correctness of the District Court's action in enjoining elections pursuant to such a plan is moot; there is no longer a justiciable case or controversy for this Court to consider on appeal.

B. **Consideration of Senate Bill 712 is premature.**

When the three-judge court held the then-existing plan of apportionment unconstitutional, it retained jurisdiction of the cause stating

> "and if the Tennessee General Assembly has not enacted a constitutional scheme of apportionment of state senatorial districts prior to June 1, 1979, the Court will reinstate the *Kopald* plan or will effectuate such other plan as may be presented to the Court that surpasses the *Kopald* plan in achieving the ideal of one person one vote." Appellants' Jurisdictional Statement at A-6, A-7.

The General Assembly has now enacted legislation, which may or may not pass the test of constitutionality set forth in the lower Court's opinion. As of this date, no hearing has been held below to determine the constitutionality of the currently enacted plan of apportionment. Counsel for appellees has requested such a hearing (see Appendix B). Without such a hearing, consideration of the validity of Senate Bill 712 on appeal is premature. For example, appellants set forth in their jurisdictional statement a chart alleging that certain areas have been moved from even-numbered districts to odd-numbered districts. (Jurisdictional Statement, pages 14 and 15) This chart

is not in the record. The information upon which it is based is not in the record. Furthermore, there is no proof in the record of the number of voters which would be moved if the facts alleged in the chart are true.

The District Court has not yet expressly passed on the constitutionality of the new statute, nor has it granted or denied an injunction preventing elections under the new bill. Thus there is no permanent injunction at this time upon which appellants may base an appeal pursuant to 28 USC § 1253.

Finally, the lower court having retained jurisdiction, the matter below is not closed on the question of relief. Should the lower court find merit in appellants' argument that substantial numbers of voters have been disenfranchised, the District Court may order all 33 Senators to stand for election in 1980. The District Courts have broad powers to shape the form of relief. *Baker v. Carr*, 369 US 186; 82 S.Ct. 691; 7 L.Ed. 21 663 (1962); *Raynolds v. Sims*, 377 US 533, 84 S. Ct. 1362 (1964). Such an order would properly follow a full hearing on the validity of S B 712. It would ensure that all voters would have an opportunity to ballot for Senator prior to the 1980 census.

MOTION TO AFFIRM

Alternatively, appellees move to affirm the judgment of the three-judge court that TCA § 3-102, as it existed on January 15, 1979, violated the Equal Protection clause of the Fourteenth Amendment to the United States Constitution by failing to draw legislative districts of equal population as nearly as may be practicable. It is manifest that the question upon which the decision of the cause depends is so insubstantial as not to need further argument.

In considering the constitutionality of TCA § 3-102, the District Court was confronted with a stipulation by the parties that the gross deviation from the optimum district size was 18% and its own finding that "No justification has been proved by the state." Appellants Jurisdictional Statement at A-6. There is no question that the basic principle of law is that the legislative district be constructed of equal population as nearly as is practical. *Reynolds v. Sims, supra* at 577, 84 S.Ct. at 1390. However, as stated in the *Reynolds* case, deviations from the ideal district size may be permitted upon a showing by the state of "legitimate considerations incident to the effectuation of a rational state policy." In the lower court, appellants offered as a justification the preference, under the state constitution, for maintaining integrity of local political subdivision lines. However, the three-judge court found that such a policy was not consistently adhered to under the plan of apportionment. Appellants did raise the disenfranchisement argument in their brief and on oral argument below; the three-judge district court properly dismissed such an issue summarily.

Appellants speculate that any change from TCA § 3-102 as it existed at the time of the Court's order will necessarily result in some voters being moved from odd-numbered to even-numbered districts. The consequence of this is that some voters who otherwise would vote for senator in 1980, will not be allowed to vote for the office of state senate until 1982. Appellants further speculate that following the 1980 Decennial Census and the subsequent re-apportionment, some voters may again be moved and will not be able to vote until 1984. Appellants speculate again that some voters moved in 1981 will be the same as those moved in 1979, leading appellants to argue that some voters will not be able to vote for senator for 8 years. This triple conjecture is the basis of Appellant's argument that the possibility of disenfranchisement justifies deviations con-

tained in previous TCA § 3-102. It is a conjecture based on speculation and grounded in guesswork. Appellants conclusions are not supported by the record. Nor can it be shown that the disenfranchisement problem justifies the variance as it existed prior to this case. In order to justify such gross deviation as is presented in this case, the state has the burden of proving that the avoidance of disenfranchisement amounts to "a legitimate consideration incident to the effectuation of a rational state policy.' *Reynolds v. Sims, Supra, Gaffney v. Cummings*, 412 U.S. 735, 93 S.Ct. 2321, 37 L. Ed. 2d 298 (1973). No such rational state policy can be shown to exist. As stated in *Cohen v. Maloney*, 410 F.Supp. 1147 (D.C. Del. 1976).

> Demonstrating that there is a rational state policy requires not merely a showing that the asserted policy is rational, but also that a coherent policy does in fact exist. This is not to say that the defendants need prove the legislators' subjective intent to implement the policy at the time they enacted the apportionment plan. It does mean that the defendants must prove that the asserted policy has been consistently adhered to by the state and local government in its apportionment scheme. At 1147.

There is and can be no showing of consistent adherence to a policy of avoiding disenfranchisement. The 1972 elections to state senate were held pursuant to a court-ordered modification of a plan which the legislature drew. *Kopald v. Carr, supra.* This plan of apportionment contained a gross deviation from the ideal district size of less than 4.5%. The following year, the General Assembly enacted the plan of apportionment held unconstitutional by the three-judge court in this case. That plan moved significant numbers of people from odd-numbered districts to even-numbered districts and vice versa, while at the same time creating a gross deviation of 18%. No consideration was given to the fact that the apportionment scheme adopted

by the General Assembly in 1973 might "disenfranchise" voters who otherwise would have cast a ballot for a state senator in 1974. Compounding this problem, the General Assembly adopted in 1976 a plan of apportionment for three state senate districts in Shelby County, Tennessee, which plan had the actual effect of disenfranchising black voters in precinct 26-2 in the City of Memphis. This plan was subsequently held unconstitutional in the case of *Brawner v. Crowell*, 434 Fed. Supp. 1119 (D.C.W. Tenn. 1977). In considering this so-called "Gillock Amendment," the General Assembly did not take into account the potentially "disenfranchising" effect of that legislation. In addition the problem is one that naturally occurs as a result of each decennial cenus; shifts in population necessitates changes in district lines.

Furthermore, the problem complained of by appellants is not properly "disenfranchisement" as that word is traditionally used. See Black's Law Dictionary, at 554 (Revised 4th Ed). Appellants do not allege that districts have been drawn so as to deprive citizens of residency in a Senate District. c.f. *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125 (1960). Appellants do not suggest that transferred voters will be denied the right to vote in elections held in the District in which they reside. Nor do appellants suggest that prior residents of a given district will vote more frequently for senators from that same district than will the newly transferred voters. All voters who reside in a given district will be allowed to vote as each election is held. The gravamen of appellants' complaint is that voters are "disenfranchised" because they will not be able to vote in the district in which they formerly resided. However, since legislators represent "people, not trees or acres," *Reynolds v. Sims, supra* at 562, it does not matter that a transferred voter would have voted had he not been transferred. A transferred voter is no longer a constituent of his former district;

he is a constituent of his new district. Disenfranchisement only occurs if a citizen is denied the right to vote for a senator from his district in the quadrennial election. There is no such denial of the right to vote in this case; therefore there is no disenfranchisement.

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or affirmed.

Respectfully submitted,

JOHN L. RYDER
Counsel for Appellees,
Richard Mader, Patricia Mae Norton, Mary Richardson, and Marsena Darlene Walker

APPENDIX

APPENDIX A

SENATE CHAMBER

State of Tennessee
Nashville

June 7, 1979

Honorable Gentry Crowell
Secretary of State
State Capitol Building
Nashville, Tennessee 37219

Dear Mr. Crowell:

This is to certify that I transmitted Senate Bill No. 712 to the Governor on May 25, 1979.

Very truly yours,

/s/ ELSIE CHASTAIN SMITH

ECS/ds

STATE OF TENNESSEE

Lamar Alexander
Governor

Executive Chamber
Nashville 37219
June 7, 1979

Dear Mr. Secretary of State:

I am hereby returning Senate Bill 712 without my signature. This bill, which reapportions the state senate, was passed by

the General Assembly in response to court order declaring the present plan of apportionment unconstitutional. However, the plan set forth in Senate Bill 712 is itself unconatitutional. I strongly object to it on several bases.

The bill splits twenty-one counties. Such excessive division of small counties is unnecessary and, in my opinion, violates state law.

What is worse, the bill systematically takes away from tens of thousands of Tennesseans their right to vote for state senator. The bill moves people from odd-numbered senate districts to even-numbered districts. Therefore, an individual who lived in an even-numbered district prior to this plan would have last voted for a senator in 1976. Under Senate Bill 712 that individual will have to wait until 1982, rather than 1980, before he gets on opportunity to vote for state senator. Of course, after 1980 these same voters may be reapportioned into districts that do not elect senators until 1982. It could go on forever, at least until angry voters get tired of having their votes taken away for political reasons.

The most objectionable portion of the plan may be, however, the Hamilton County situation. Under this bill the Hamilton County portion of District 9 is not contiguous to the balance of District 9. Apparently the only point at which the two portions touch is a stretch of the Tennessee River between the two counties. There is no bridge, no ferry, no access between the two. Further, two precincts are placed in Senate District 10 in Hamilton County, although they touch no part of District 10 at any point. Such districts do not meet the state constitution's requirement that various portions of the senate districts must be contiguous.

Senate Bill 712 defies the constitution of the State of Tennessee, defies established case law under the Fourteenth Amend-

ment, and defies common sense. It represents blatant and outrageous gerrymandering.

I would have vetoed the bill. But the Democratic majority is so determined to protect itself that a veto would surely be overridden. I therefore do not want to waste the taxpayer's hard-earned dollars to bring the legislature back for such a partisan political matter.

Sincerely,

/s/ LAMAR ALEXANDER

(Received June 12, 1979, Secretary of State)

PUBLIC CHAPTER NO. 443
SENATE BILL NO. 712

By Hamilton, Crouch, Mr. Speaker Wilder
Substituted for: House Bill No. 604
By Burnett (Fentress)

AN ACT To amend Tennessee Code Annotated, Section 3-102, relative the reapportionment of the State Senate.

WHEREAS, It is the intent of the General Assembly of the State of Tennessee to equitably apportion itself with due consideration to Sections 5 and 6 of Article II of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 3-102, is amended by deleting the section in its entirety and substituting in lieu thereof the following:

State Senatorial Districts-Residence Requirements.— Until the next enumeration of qualified voters and apportionment of senators, the state senatorial districts shall be composed as follows:

All subdistrict lines cited in the following descriptions are those in effect as of May 1, 1979, unless otherwise noted.

(1) Senate District 1. Carter and Johnson Counties and that portion of Washington County which is not established as a portion of Senate District 3, as set out hereinafter.

(2) Senate District 2. All of Sullivan County except voting precincts 14 MP and 14 CH.

(3) Senate District 3. Greene, Hawkins, Unicoi Counties, Sullivan County voting precincts 14 MP and 14 CH, that portion of Washington County lying within the Sulphur Springs census division and the Telford census division, and Hancock County magisterial districts 5, 6, 7, 8, 9, 10 and 12.

(4) Senate District 4. Grainger, Hamblen, Jefferson, Cocke and Union Counties, Hancock County magisterial districts 1, 2, 3, 4 and 11, and Claiborne County magisterial districts 3 and 4.

(5) Senate District 5. Anderson County, the following voting wards of the City of Knoxville: SH 19, 36, 37, 38, 39, 40 and 41, and the following voting precincts of

Knox County: Corryton, Dante, Fort Sumpter, Gibbs, Brickey, Heiskell, Hills, Pedigo, Halls, Powell, Karns and Solway.

(6) Senate District 6. The following voting precincts of Knox County: Huffs, Sunnyview, Ramsey, Riverdale, Dora Kennedy, Ellistown, Maloneyville, Shannondale, Ritta, Skaggston, Carter, Thorngrove, Kings, Mount Olive, Rocky Hill, Sevier Homes, Vestal, Gap Creek and Hopewell, and the following voting wards of the City of Knoxville: 13, Middle 14, East 14, East 15, West 15, South 16, North 16, FH 25, 25 Vestal, East 26, West 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 49.

(7) Senate District 7. The following voting precincts of Knox County: Lonas, Hardin Valley, Concord, Farragut, Cedar Bluff, Bluegrass and Ball Camp, the following voting wards of the City of Knoxville: 1, 6, 7, 8, 9, North 10, South 10, East 11, Middle 11, West 11, 12, East 17, West 17, 18, FH 19, 20, 21, 22, South 23, North 23, South 24, North 24, Seq. 24, 42, 43, 44, 45, 46, 47, 48, North 50, South 50 and 51, the Glendale precinct of Loudon County, and the following precincts of Blount County: Binfield, Maryville E. College, Maryville Jr. High, Fairview City, Fairview, Friendsville City, Friendsville, Miser Station, Alcoa High School, Louisville School and Mentor.

(8) Senate District 8. Sevier and Monroe Counties, all of Blount except that in Senate District 7, and all of Loudon County except that in Senate District 7.

(9) Senate District 9. Bradley, Polk and McMinn Counties, Meigs County magisterial districts 1, 2, 3 and 4, and the following voting precincts of Hamilton County: Bakewell, Dallas, Lakesite, Middle Valley, Mowbray, Sale Creek and Soddy Daisy North.

(10) Senate District 10. The following Hamilton County voting precincts: Airport, Alton Park, Amnicola, Avondale, Bustown, City Hall, Court House, Downtown, Dupont, Eastdale, Falling Water, Glenwood, Howard, Lupton City, Moccasin Bend, Mountain Creek, North Chattanooga, North Woods, Orchard Knob, Piney Woods, Riverview, St. Elmo, Stuart Heights, Valdeau City, Valley View City, Wauhatchie City, Fairmount, Falling Water County, Lookout Mountain, Red Bank 1, Red Bank 2, Red Bank 3, Red Bank 4, Signal Mountain East, Signal Mountain West, Soddy Daisy South, Valdeau County, Valley View County, Walden and Wauhatchie County.

(11) Senate District 11. The following Hamilton County voting precincts: Bonny Oaks, Brainerd, Brainerd Hills, Cedar Hills, Clifton Hills, Concord, East Brainerd, East Chattanooga, East Lake, East Side, Eastgate, Highland Park, Hixon, Kingpoint, Lake Hills, Missionary Ridge, Murry Hills, Northgate, Ridgedale, Sunnyside, Tyner, Woodmore, Apison, Birchwood, Collegedale, East Ridge 1, East Ridge 2, East Ridge 3, East Ridge 4, East Ridge 5, Harrison, Meadowview, Ooltewah, Ridgeside, Snowhill and Westview.

(12) Senate District 12. Cumberland, Morgan and Campbell Counties, all of Roane County except Glen Alice, Fairview, Midway, Paint Rock, Renfro and Johnson School House precincts of Roane County, all of Claiborne County except that portion of Senate District 4, and Scott County magisterial districts 1, 2, 3 and 5.

(13) Senate District 13. Putnam, Jackson, Clay, Overton, Pickett, Fentress, White, DeKalb and Van Buren Counties, and Scott County magisterial districts 4, 6 and 7.

(14) Senate District 14. Bledsoe, Rhea, Sequatchie, Marion, Warren and Franklin Counties, Meigs County

magisterial district 5, all of Grundy County except magisterial district 3, and that portion of Roane County lying in the Glen Alice, Fairview, Midway, Paint Rock, Renfro and Johnson School House precincts.

(15) Senate District 15. Sumner, Macon, Trousdale and Smith Counties, and Wilson County except magisterial districts 2, 11, 13 and 16.

(16) Senate District 16. All of Moore, Rutherford, Cannon and Coffee Counties, magisterial district 3 of Grundy County, and that part of Lincoln County not included in Senate District 17.

(17) Senate District 17. All of Marshall, Giles, Maury and Bedford Counties, and that portion of Lincoln County in magisterial districts 1, 2, 4 and the Howell Hill and Lincoln precincts of magisterial district 8.

(18) Senate District 18. That portion of Davidson County lying within councilmanic districts 3, 4, 7, 8, 9, 10 and 11, the 2nd, 3rd, 4th, 5th, and 6th precincts of councilmanic district 1, the 1st precinct of councilmanic district 5, and 2nd and 3rd precincts of councilmanic district 6, and the 1st and 4th precincts of councilmanic district 22.

(19) Senate District 19. That portion of Davidson County lying within councilmanic districts 2, 17, 18, 19, 20 and 21, the 1st precinct of councilmanic district 1, the 2nd, 3rd, and 4th precincts of councilmanic district 5, the 1st precinct of councilmanic district 6, the 1st and 2nd precincts of councilmanic district 26, the 1st, 2nd and 3rd precincts of councilmanic district 27 and the 1st precinct of councilmanic district 28.

(20) Senate District 20. That portion of Davidson County lying within councilmanic districts 12, 13, 15, 16, 29, 30 and 31, the 2nd, 3rd, and 4th precincts of council-

manic district 28, and the 5th precinct of councilmanic district 32, and Wilson County magisterial districts 2, 11, 13 and 16.

(21) Senate District 21. That portion of Davidson County lying within councilmanic districts 23, 24, 33, 34 and 35, the 2nd precinct of councilmanic district 22, the 1st, 2nd, 3rd, 4th and 5th precincts of councilmanic district 25, the 3rd precinct of councilmanic district 26, the 5th precinct of councilmanic district 27, and the 1st, 2nd, 3rd and 4th precincts of councilmanic district 32, Cheatham County magisterial districts 6 and 7, and Dickson County except magisterial districts 2 and 7.

(22) Senate District 22. Montgomery, Robertson, Stewart and Houston Counties, Cheatham County magisterial districts 1, 2, 3, 4 and 5, and Humphreys County magisterial districts 1, 2 and Plant precinct of magisterial district 4.

(23) Senate District 23. Hickman, Williamson, Lewis, Lawrence and Benton Counties, Humphreys County except magisterial districts 1 and 2 and Plant precinct of magisterial district 4, Dickson County magisterial districts 2 and 7, and Wayne County except Beech Creek voting precinct.

(24) Senate District 24. Lake, Obion, Weakley, Henry and Carroll Counties and the following portions of Dyer County: Bogota and 5th consolidated precincts of magisterial district D.

(25) Senate District 25. Madison and Gibson County and Henderson County magisterial districts 1 and 3.

(26) Senate District 26. Fayette, Hardeman, McNairy, Hardin, Chester, Perry and Decatur Counties, Henderson County except magisterial districts 1 and 3, and Beech Creek voting precinct of Wayne County.

(27) Senate District 27. Tipton, Haywood, Lauderdale and Crockett Counties, Dyer County except the following portions: Bogota and 5th consolidated precincts of magisterial district D, and that portion of Shelby County lying within the following Shelby County voting districts: Stewartsville, Arlington, Brunswick, Kerrville, Lakeland and Eads.

(28) Senate District 28. That portion of Shelby County lying within the Shelby County voting districts of McConnell and Woodstock and the following voting precincts of Memphis: 21-2, 21-3, 40-1, 40-2, 41-1, 41-2, 41-3, 42-1, 42-2, 43-1, 43-2, 52-1, 52-2, 52-3, 53-1, 53-2, 53-3, 62-1, 62-2, 69-1, 69-2, 70-1, 70-2, 70-3, 71-1, 71-2, 71-3, 72-1, 72-2, 72-3, 72-4, 72-5, 72-6.

(29) Senate District 29. That portion of Shelby County lying within the following voting precincts of Memphis: 1, 2, 7, 11-1, 11-2, 12, 13-1, 13-2, 13-3, 14-1, 14-2, 15, 18, 22, 25-1, 25-2, 25-3, 26-1, 27-1, 27-2, 27-3, 32, 34-2, 35-2, 35-3, 39, 49-1, 50-1, 51.

(30) Senate District 30. That portion of Shelby County lying within the following voting precincts of Memphis: 16-1, 16-2, 16-3, 17-1, 17-2, 20-1, 20-2, 20-3, 21-1, 28-1, 28-2, 29-1, 29-2, 30, 31-1, 31-2, 31-3, 31-4, 33, 36-1, 36-2, 36-3, 37, 38-2, 44-4, 44-5, 45-1, 45-3, 45-4, 47-1, 47-2, 47-3, 45-2, 59-1, 59-2, 59-3, 61-1, 61-2.

(31) Senate District 31. That portion of Shelby County lying within the following voting precincts of Memphis: 38-1, 38-3, 44-1, 44-2, 44-3, 46-1, 46-2, 46-3, 54-1, 54-2, 55-1, 55-2, 56-1, 56-2, 57, 58-1, 58-2, 58-3, 58-4, 58-5, 63-1, 63-2, 64-1, 64-2, 65-1, 65-2, 66-1, 66-2, 67-1, 67-2, 68-2, 68-3, 73-1, 73-2, 73-3, 73-4, 73-5, 74-2, 74-3, 74-4, 74-5, 74-7, 74-8, 74-9.

(32) Senate District 32. That portion of Shelby County lying within the following Shelby County voting districts: Bartlett 1, Bartlett 2, Bartlett 3, Bartlett 4, Capleville, Collierville 1, Collierville 2, Cordova, Forest Hills, Germantown 1, Germantown 2, Germantown 4, Germantown 5, Germantown 6, Germantown 7, Hickory Hill, Locke, Lucy, Millington 1, Millington 2, Morning Sun, Mullins, Ross Store, and the following City of Memphis voting precincts: 60-2, 60-5, 60-7, 67-3, 68-1, 73-6, 74-1, 74-6, 78-5, 79-6, 80, 81-1, 81-2, 81-3, 81-4, 83, 84, 85, 86, 87-1, 87-2, 87-3, 88-1, 88-2, 89-1, 89-2, 90-1, 90-2.

(33) Senate District 33. That portion of Shelby County lying within the following City of Memphis voting precincts: 26-2, 34-1, 48, 49-2, 50-2, 60-1, 60-3, 60-4, 60-6, 60-8, 75-1, 75-2, 75-3, 75-4, 75-5, 75-6, 75-7, 75-8, 76-1, 76-2, 76-3, 76-4, 76-5, 77-1, 77-2, 77-3, 78-1, 78-2, 78-3, 78-4, 79-1, 79-2, 79-3, 79-4, 79-5, 82-1, 82-2, 82-3.

All references to enumeration districts are to those districts as so designated in the official 1970 federal census. A reference to a specific enumeration district includes that district in all of its parts although parts thereof may be designated by a letter of the alphabet in addition to its numerical designation.

It is the legislative intent that all senate districts shall be contiguous and, toward that end, if any enumeration or voting district or other geographical entity designated as a portion of a senate district is found to be non-contiguous with the larger portion of the senate denate district, it shall be constituted a portion of the senate district smallest in population to which it is contiguous.

SECTION 2. A candidate for election to the office of senator shall be required to reside in the senatorial district from which

he seeks to be elected for one (1) year immediately preceding the election.

SECTION 3. Senators and representatives elected to the Ninety-first General Assembly shall, until the next general election of members of the General Assembly, represent their respective disticrts as constituted prior to the effective date of this act. At the November, 1980, general elecion and thereafter until changed by law, senators and representatives shall be elected to represent districts as provided in this act.

However, nothing herein shall be construed as depriving any member of the Senate of the Ninety-first General Assembly of his office or as affecting or modifying the requirement of staggered senatoriai terms or any other provisions of Article II, Section 3 of the Constitution of Tennessee, and those senators elected in districts designated by odd numbers in the General Election of 1978 shall continue to represent their respective districts as constituted both before and after the effective date of this act, until the election of their successors at the November, 1982 general election.

SECTION 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 5. This act shall take effect on becoming law, the public welfare requiring it.

SENATE BILL NO. 712

PASSED: May 17, 1979

/s/ JOHN S. WILDER
Speaker of the Senate

/s/ NED McWHERTER
Speaker of the House of Representatives

APPROVED this ..... day of ..... 19..

.....
Governor

SENATE CHAMBER
STATE OF TENNESSEE
Nashville
June 13, 1979

The Honorable Gentry Crowell
Secretary of State
State of Tennessee

Dear Mr. Secretary:

Senate Bill No. 712 contains a clerical error on page 6 in the second paragraph, line 6. The word "denate" appears between the words "senate" and "district". A corrected page 6, on which the word "denate" has been deleted, is attached.

Very truly yours,

/s/ ELSIE CHASTAIN SMITH
Chief Engrossing Clerk
of the Senate

ECS/smc
Enclosure

All references to enumeration districts are to those districts as so designated in the official 1970 federal census. A reference to a specific enumeration district includes that district in all of its parts although parts thereof may be designated by a letter of the alphabet in addition to its numerical designation.

It is the legislative intent that all senate districts shall be contiguous and, toward that end, if any enumeration or voting district or other geographical entity designated as a portion of a senate district is found to be non-contiguous with the larger portion of the senate district, it shall be constituted a portion of the senate district smallest in population to which it is contiguous.

SECTION 2. A candidate for election to the office of senator shall be required to reside in the senatorial district from which he seeks to be elected for one (1) year immediately preceding the election.

SECTION 3. Senators and representatives elected to the Ninety-first General Assembly shall, until the next general election of members of the General Assembly, represent their re-

spective districts as constituted prior to the effective date of this act. At the November, 1980, general election and thereafter until changed by law, senators and representatives shall be elected to represent districts as provided in this act.

However nothing herein shall be construed as depriving any member of the Senate of the Ninety-first General Assembly of his office or as affecting or modifying the requirement of staggered senatorial terms or any other provisions of Article II, Section 3 of the Constitution of Tennessee, and those senators elected in districts designated by odd numbers in the General Election of 1978 shall continue to represent their respective districts as constituted both before and after the effective date of this act, until the election of their successors at the November, 1982 general election.

SECTION 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 5. This act shall take effect on becoming law, the public welfare requiring it.

APPENDIX B

LAUGHLIN, HALLE, REGAN, CLARK & GIBSON
Attorneys at Law

2201 First Tennessee Bank Building

Memphis, Tennessee 38103

(901) 525-1593

June 7, 1979

The Honorable L. Clure Morton
United States District Judge
United States Courthouse
Nashville, TN. 37219

Re: Mader v. Crowell

No. C-78-3079 NA-CV

Dear Judge Morton:

Pursuant to the order of the District Court entered on January 15, 1979, this Court retained jurisdiction of the above referenced case for purposes of considering the constitutionality of any action taken by the General Assembly prior to June 1, 1979. It appears at this time that the General Assembly has passed certain legislation modifying the apportionment of State Senate Districts in Tennessee. This bill has now become law without the Governor's signature. Therefore, there is now an act to be considered by the Court pursuant to its earlier order.

By this letter, we are requesting, as counsel for the plaintiffs, a hearing on the constitutionality on Senate Bill 712 in order to dispose of this case. We would appreciate an opportunity to take discovery or submit briefs prior to such a hearing.

Very truly yours,

JOHN L. RYDER

JLR/ap

cc: Mr. William W. Hunt, III
Assistant Attorney General
State of Tennessee
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1780

RICHARD MADER, PATRICIA MAE NORTON, MARY RICHARDSON, and MARSENA DARLENE WALKER,
Petitioners,

vs.

GENTRY CROWELL, Secretary of State of the State of Tennessee; RAY BLANTON, Governor of the State of Tennessee and his successors in office; BROOKS McLEMORE, Attorney General of the State of Tennessee and his successors in office; DAVID COLLINS, Coordinator of Elections of the State of Tennessee; and JAMES E. HARPSTER, JACK C. SEATON, TOMMY POWELL, RICHARD HOLCOMB, and LYTLE LANDERS, Commissioners of the State Board of Elections,
Respondents.

RESPONSE TO PETITION FOR REHEARING

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Respondents.

RESPONSE TO PETITION FOR REHEARING

Pursuant to the Court's Order of November 13, 1979, the Respondents herein respond to the Petition for Rehearing filed by the Petitioner in the above-styled action, and respectfully moves this Court to deny Petitioner's Petition for Rehearing.

STATEMENT OF THE CASE

On January 15, 1979, a three-judge Federal Court in Nashville held unconstitutional Tennessee Code Annotated, §3-102, which governed the apportionment of the Tennessee State Senatorial Districts. Respondents thereafter filed an in-

terlocutory appeal from this Order with this Honorable Court. Meanwhile, the Tennessee State Legislature revised Tennessee Code Annotated, §3-102 so as to comply with the decision of the three-judge Federal Court. Chapter No. 443, Tennessee Public Acts of 1979.

On October 1, 1979, this Court issued an order vacating the judgment of the District Court below and remanding this case to said Court with the instructions that this case be dismissed. On October 13, 1979, Petitioner filed a petition to rehear this Court's Order and on November 13, 1979, this Court requested a response to Petitioner's petition.

ARGUMENT

The Petitioner's Petition to Rehear Should be Denied as the Issue Originally Presented to the District Court is now Moot.

Petitioner originally brought this action to test the constitutionality of the apportionment of Tennessee's State Senate. As a result of Petitioner's action, said apportionment was declared unconstitutional and a new statute was enacted by the Tennessee State Legislature. In its order issued on October 1, 1979, this Court apparently found the issues in this case to be moot and remanded the case to the three-judge court with orders that it be dismissed. Petitioner complains that the Order of this Court prevents the District Court from reviewing the new statute enacted by the Tennessee Legislature in 1979.

This Court has held that "it is usual practice when a case has become moot" to remand the case to the District Court for dismissal. *U. S. v. Munsingwear,* 340 U.S. 36 (1950). Respondents acknowledge that this Court has previously stated that, in some instances, the case may be remanded with leave to Appellants to amend pleadings. See *Diffenderfer v. Central Baptist Church of Miami, Florida,* 404 U.S. 412 (1971). (Petitioners' have not amended their pleadings in the instant case,

but have merely written to the District Court requesting a hearing on the constitutionality of the new statute. See Appendix B, Motion of Appellees to Dismiss or Affirm, filed in the instant action). Respondents would submit that for a petition to rehear to be granted in a moot case, there must be a showing of unusual or extensive harm. There is no harm possible in the instant case.

If the petition to rehear is denied and this case is dismissed, the Petitioner may still contest the constitutionality of the 1979 statute by initiating a new action. Furthermore, contrary to Petitioner's assertions, this Court's original order does not deny Petitioner's attorney from being awarded attorney's fees. After an appeal, it is within the jurisdiction of the three-judge court to re-award attorney's fees, pursuant to 42 U.S.C. §1988. See, for instance, *Signal Men of America v. Southern Railway Company,* 380 F.2d 59 (4th Cir. 1967); *LaGarde Finance Company v. Vinet,* 346 F.2d 846 (5th Cir. 1965); *Boice v. Boice,* 56 F. Supp. 339 (D. N. J. 1944).

Respondents, on the other hand, may face substantial harm if the Petitioner's petition is granted. This Court indicated in *Gaffney v. Cummings* that the apportionment of legislative districts is basically a legislative task:

> From the very outset, we recognize that the apportionment task dealing as it must with fundamental choices about the nature of representation, is primarily a political and legislative process. We doubt that the Fourteenth Amendment requires repeated displacement of other appropriate state decision making in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say would deprive any person of fair and effective representation in his state legislature. *Gaffney v. Cummings,* 412 U.S. 749 (1973).

See also *Mahan v. Howell,* 410 U.S. 315 (1973); *Dush v. Davis,* 387 U.S. 112 (1967); *Sailors v. Board of Education,* 387 U.S.

105 (1967); *Burns v. Richardson,* 384 U.S. 73 (1972). The above cases mandate that until invidious discrimination is demonstrated in an attack upon the apportionment of State legislative districts, the burden rests upon the Plaintiffs and not the Defendants in apportionment cases. See also, *White v. Register,* 412 U.S. 755 (1973).

However, the District Court's Order implies that the Respondents and not the Petitioners have the burden of establishing the constitutionality of the new reapportionment act. Invidious discrimination need not be proved by the Petitioners. Such would appear to be contrary to the above decisions. On the other hand, if the Petitioners are compelled to bring a new lawsuit, the burden would rightfully be upon them to prove that invidious discrimination is behind the enactment of the new reapportionment.[1]

---

[1]The initial apportionment act was declared unconstitutional due to large population variances; as noted in Appendix A submitted by the Respondents with this response, the populations of the new Senate Districts no longer retain their large population variances. However, the Respondents submit that the burden would still remain upon them to prove its constitutionality if this case were remanded to the Lower Court to reconsider the constitutionality of the new statute.

CONCLUSION

For the reasons stated herein, Respondents respectfully request that the Petition for Rehearing filed by Petitioners in the above-styled action be denied.

Respectfully submitted,

WILLIAM M. LEECH, JR.
Attorney General

ROBERT B. LITTLETON
Deputy Attorney General

WILLIAM W. HUNT, III
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response has been forwarded to John L. Ryder, Esq., Laughlin, Halle, Regan, Clark & Gibson, 2201 First Tennessee Bank Building, Memphis, Tennessee 38103, on this the 12th day of December, 1979.

WILLIAM W. HUNT, III
Assistant Attorney General

APPENDIX

APPENDIX A

1979 Senate Districts

S.D.	Population	+ or −	%Variation
1	118,705	−265	−.22%
2	119,204	+234	+.20%
3	118,860	−110	−.09%
4	119,260	+290	+.24%
5	119,203	+233	+.20%
6	118,786	−184	−.15%
7	118,838	−132	−.11%
8	119,492	+522	+.44%
9	118,589	−381	−.32%
10	119,277	+307	+.26%
11	119,308	+338	+.28%
12	119,417	+447	+.38%
13	118,726	−244	−.21%
14	119,336	+336	+.31%
15	118,652	−318	−.27%
16	119,104	+134	+.11%
17	119,412	+442	+.37%
18	118,656	−314	−.26%
19	118,437	−533	−.45%
20	118,846	−124	−.10%
21	118,617	−353	−.30%
22	118,736	−234	−.20%
23	119,372	+402	+.34%
24	118,887	−73	−.06%
25	118,686	−284	−.24%
26	119,053	+83	+.07%
27	118,716	−254	−.21%
28	118,947	−23	−.02%
29	119,121	+151	+.13%
30	119,075	+105	+.09%

31	119,197	+227	+.20%
32	118,767	−203	−.17%
33	118,736	−234	−.20%

Maximum over 522	.44%
Maximun under 533	.45%
Total Variance	.89%
Average Variance + or −	.21%

.10% or under	6 Districts
.11% to .20%	10 Districts
.21% to .30%	10 Districts
.31% to .40%	5 Districts
.41% or more	2 Districts

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Respondents.

PETITION FOR REHEARING

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Respondents.

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an Order modifying its Order of October 1, 1979, and granting this Petition. As grounds for this Motion, Petitioner states the following:

The Order of this Court dated October 1, 1979, remands this case to the District Court with instructions to dismiss. Petitioner respectfully requests that the Order of this Court be modified to remand the case for further proceedings.

The United States District Court for the Middle District of Tennessee sitting at Nashville entered an Order on January 15, 1979, which covered four points:

> "(1) Tennessee Code Annotated, §3-102, State Senatorial Districts — residence requirements, is declared unconstitutional;
>
> "(2) Defendants and their successors in office are enjoined from conducting or causing to be conducted any primary or general election pursuant to the provisions of Tennessee Code Annotated, §3-102;
>
> "(3) The Court retains jurisdiction of this action, and in the event no constitutional plan of apportionment of Tennessee Senatorial Districts is enacted by the General Assembly by June 1, 1979, this Court will impose a plan of apportionment;
>
> "(4) A reasonable attorney's fee will be awarded as part of the costs taxed to Defendants, and a hearing to determine the amount of said fee will be held on a date to be determined." (Appendix to Jurisdictional Statement of Appellants, page A-8)

Defendants appeal was taken from this Order during the pending of the appeal, TCA 3-102 was amended. Parts 1 and 2 of the District Court's Order are clearly moot. However, parts 3 and 4 require further proceedings in the Court below. In fact, the District Court has scheduled a hearing for November 14, 1979, on point 3. See attached Exhibit 1. Plaintiff and Defendants have engaged in substantial preparation for this hearing, including discovery proceedings. See attached Exhibit 2.

As in the case of *Diffenderfer vs. Central Baptist Church of Miami,* 404-05-412, 92 S. Ct. 574 (1972), this case should be remanded for further proceedings. In that case the challenged statute was amended before this Court rendered its opinion.

Finding that the Plaintiffs might wish to attack the newly enacted legislation, this Court remanded with leave to amend the pleadings to permit such a challenge. *Diffenderfer vs. Central Baptist Church of Miami,* supra. 29 S Ct. at 576. In the instant case, Plaintiffs have already begun an attack on the newly enacted legislation. All that is necessary is to permit the lower Court to hold the hearing now scheduled.

The District Court, in its Order, retained jurisdiction for the purpose of considering an attack on the new legislation. As noted by Appellants in their statement of the case, the amendments were enacted "in order to attempt to comply with the Court's Order." Jurisdictional Statement, page 10. Appellees noted in their Motion to Dismiss that consideration of the amendments (Senate Bill 712) was premature at the time of the appeal. Consideration of the constitutionality of Senate Bill 712 is now appropriate, at the trial level.

This retention of jurisdiction and subsequent hearing on the constitutionality of a plan of apportionment is a method previously used by the District Courts in Tennessee. *Kopald v. Carr,* 343 F. Supp. 51 C.M.D. Tenn. (1973); *Bright v. Crowell,* No. 78-3148 (M.D. Tenn.); The District Courts have broad powers to shape the appropriate relief in apportionment cases. *Reynolds v. Simms* 377 U.S. 539, 84 S. Ct. 1392; 12 L.Ed., 506 (1964).

Furthermore, the interest of justice would be served by resolving the issue of the constitionality of amendments to TCA 3-102 in this proceeding, rather than terminating this case at this time which would necessitate a new lawsuit, a new three-judge court, and new hearings in order to test the validity of those amendments. The matter has been certified as a class action, so that all necessary plaintiffs are present. The hearing scheduled for November 14, 1979 should be allowed so that the validity of the State Senate Districts can be determined prior to the 1980 elections.

In the fourth part of the District Court's Order attorneys fees were awarded with the amount of the fee to be determined in a hearing to be held later. That hearing has not been scheduled, pending completion of other matters before the Court, including determination of the constitutionality of the amendments to TCA 3-102.

Plaintiffs sought an award of attorneys fees pursuant to the Civial Rights Attorneys Fees Award Act of 1976, as amended, 42 USC §1988. The District Court in this case, in the exercise of its discretion, determined that such an award was appropriate. Termination of the case at this point would preclude Plaintiffs from recovering attorneys fees and contradict the legislative policy underlying 42 USC §1988. As stated in the Senate Report on the amendments to the Civil Rights Attorneys Fee Award Act:

> In many cases rising under our Civil Rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court. 5 US Code Congressional and Administrative News, page 5910.

While the award of fees is discretionary with the Trial Court, this case it a particularly appropriate one for such an exercise of such discretion. Because of Tennessee's 60 year failure at reapportionment, the fountainhead case of all reapportionment matters was litigated in the Federal Courts, *Baker v. Carr,* 369 US 186 (1962). However, the inequities did not cease, but continued and were litigated in subsequent cases: *Baker v. Carr,* 247 F. Supp. 629 (1967), *Baker v. Ellington,* 273 F. Supp. 174 (1967), *Lopald v. Carr,* 343 F. Supp. 51 (1972), *Brawner v. Crowell,* and *White v. Crowell,* 434 F. Supp. 1119 (1977),

Sullivan v. Crowell, Nelson v. Crowell, and *Algood v. Crowell,* 444 F. Supp 60 (1978), *Bright v. Crowell, supra,* and this case. With the exception of the three Baker cases, all of these cases have been brought within the last seven years. The thread running through all of these cases is that unless forced into compliance by orders of the Federal Courts, the Tennessee General Assembly will not enact reapportionment legislation meeting the basic constitutional tests and limitations. In this matter, Plaintiffs were forced again to seek relief from the Courts in order to obtain the rights guaranteed them under the Fourteenth Amendment. A hearing on the amount of attorneys fees should be allowed to take place in lower court.

CONCLUSION

For the reasons stated herein, Petitoner respectfully requests that the Order of the Court entered October 1, 1979, be modified to remand the case to the District Court for the Middle District of Tennessee, for further proceedings in accordance with parts 3 and 4 of its Order of January 13, 1979.

Respectfully submitted,

LAUGHLIN, HALLE, REGAN,
CLARK & GIBSON

John L. Ryder
2201 First Tennessee
Bank Building
Memphis, Tennessee 38103

Counsel for Petitoners

Dated: October 13, 1979

CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58.

John L. Ryder
Counsel for Petitoners

CERTIFICATE OF SERVICE

I, John L. Ryder, do hereby certify that a copy of the foregoing Petition for Rehearing has been served on Robert B. Littleton, Deputy Attorney General, State of Tennessee, and William W. Hunt, III, Assistant Attorney General, State of Tennessee, by mailing a copy fo same, postage prepaid, this 13th day of October, 1979.

John L. Ryder